Austin Abbott

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Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED

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CASE AND COMMENT

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Austin Abbott.

No name is more familiar to the legal practitioners of to-day, or more respected by them, than that of Austin Abbott. For a generation his legal works have been working tools which lawyers everywhere have respected for their ability and trusted for their accuracy and thoroughness.

The Abbott family has been known as a notable one for two generations. Jacob Abbott, the father, and John S. C. Abbott, an uncle of Austin, were both popular authors. Jacob, a Congregational clergyman, and for a time a professor in Amherst College, wrote numerous juvenile books, such as the "Rollo" books, and "Science for the Young," that entertained and influenced a large number of the men of to-day. John S. C. Abbott, also a Congregational clergyman, wrote various historical works, including "The History of Napoleon Bonaparte" and a "History of the Civil War in America."

The sons of Jacob Abbott have added much additional luster to the family name. Benjamin Vaughan Abbott, who was associated with Austin in their earlier legal work on "Abbott's Forms," "Abbott's Practice Reports," the first edition of "Abbott's New York Digest," and various other legal publications, engaged after their separation in the preparation of well-known legal publications, including the United States Digest and the National Digest. Lyman Abbott, also, began a legal career, but soon abandoned it to take up that of preacher and editor, in which he has become one of the living forces of the time.

Austin Abbott's legal publications after he and Benjamin Vaughan began to work independently included a new edition of the New York Digest, "Abbott's New Cases," "Abbott's New York Court of Appeals Decisions," and the extraordinarily popular trial briefs on evidence, pleading, civil jury trials, criminal trials, and modes of proving facts. For many years he also wrote daily editorials for the "New York Law Register."

In his active practice of the law Austin Abbott participated in some of the most famous trials of the century. He was one of the counsel of Henry Ward Beecher in the case of Tilton *v.* Beecher, and one of the counsel of the government in the Guiteau trial. As adviser and counselor he was sought by other lawyers in a great number of cases, in which he prepared opinions or briefs for them upon important and difficult questions.

The University Law School of the City of New York secured Mr. Abbott as its dean in 1891, with the chair of pleading, equity, and evidence. This was followed by the enlargement of the undergraduate work, the addition of a postgraduate course, and a great increase in the number of students.

In the New York Bar Association, and especially in its committee on law reform, Mr. Abbott was an active and prominent member. He read able papers on legal subjects before

the association at various annual meetings, the last one being in 1895, on the question, "Should the Code of Civil Procedure be Revised, Condensed, and Simplified." His valuable work was not confined to legal matters, but he was a member of the Indian conference and of other bodies engaged in moral, religious, and educational work.

His personal appearance and character were described by a writer in the "American Lawyer" as follows: "He was tall, erect, and slender, with broad forehead and finely chiseled features. He was genial in manner and had an abounding sense of humor. He was exceptionally modest and retiring. He was a sincere Christian gentleman. He left many friends. He had no enemies."

Strange Vehicles in Streets.

Just as familiarity has bred indifference to electric street cars among most of the equine population a new terror appears among them. The automobile is the latest monster, and for some time to come it is likely to cause an occasional runaway on the streets. The liability for frightening horses by the use of such a vehicle is an interesting question which lately arose in the county court at Rochester, New York, and was decided by Judge Sutherland in an interesting opinion. A judgment of the municipal court in favor of the plaintiff, whose horse had been frightened by an automobile, was reversed, and the law of the subject declared as follows:

"The horse has no paramount or exclusive right to the road, and the mere fact that a horse takes fright at some vehicle run by new and improved methods, and smashes things, does not give the injured party a cause of action. . . . If the defendant's motor carriage is practicable for the purpose of travel, and the noise and vapor caused by its use are kept within reasonable limitations, and are no greater than are fairly incident to the use of motor carriages which are found adapted to the needs of the general public, then I cannot see how the defendant can be held liable in the absence of evidence that at the particular time complained of the carriage was operated carelessly. . . .

"The temporary inconvenience and dangers incident to the introduction of these modern and practical modes of travel upon the highway must be subordinate to the larger and permanent benefits to the general public resulting from the adoption of the improvements which science and inventive skill have perfected."

This opinion is unquestionably sound. There ought to be no doubt of the right, on the one hand, to adopt improved and valuable new methods of conveyance in the public streets, or of the necessity, on the other hand, of reasonable care to avoid damage in so doing. It is, of course, true that the rule of ordinary prudence requires extra care with respect to frightening horses on the part of one who takes a strange looking vehicle on the street, because the very fact of its strangeness makes an extra danger. When it becomes no longer strange, but common, the danger may become less, and therefore the degree of care and caution demanded may be for that reason proportionately less. An exercise of such care as the peculiar character combined with the strangeness of the vehicle demands ought, certainly, to be a defense against liability for frightening horses by the use of any new conveyance that is of real public utility.

College Dignitaries and Free Speech.

Unpopular utterances by college presidents and professors have created trouble several times in recent years. Much that is unreasonable has been said both for and against the right of such persons to express their views on public questions. Both those who approve and those who condemn too often do so without any clear principle of judgment, but merely because of their sympathy or lack of sympathy with the views expressed. The matter cannot be reasonably judged without remembering that such person does not stand in merely private relations.

The representative capacity of a person who is chiefly known as a college president or professor is something of which he cannot rid himself when he addresses the public, even if he wish to do so. In fact, except for the position which he holds, the public interest in what he may say and the effect of his utterances would usually be much less, and would sometimes be wanting entirely. When his views are published they are always described as the views of a college president or professor. For that reason, whether he so wills it or not, he drags the college with him into any controversy that he may engage in, and uses his representative position to give weight to his private opinions.

Freedom of speech is a right that is never unlimited unless it may be in the case of a

strictly private person. A representative must regard the rights of those whom he represents. He has no right to misrepresent them. If he does so, he must not complain when they choose another representative. The right of a college president or professor to think and speak his own thoughts does not include the right to be supported by those whom he antagonizes. If a professor in a college supported by a Christian church should publicly attack Christianity and advertise himself as an atheist, no sensible person could regard his dismissal as an infringement of his liberty of thought or of speech. He would no longer be a proper or useful instructor for an institution of that kind. So a blatant advocate of revolution and anarchy, however complete his freedom may be, would not be entitled to hold a professorship in a state university and draw a salary from the government while propagating treasonable sentiments. These illustrations show clearly enough that there are at least some limits within which men who represent a college must keep in their public advocacy of disturbing opinions.

Views which do not directly antagonize any fundamental purpose of the institution may yet be so unpopular as to bring the institution into discredit and work it injury, when they are advocated by one who stands prominently before the public as its representative. Has he the right in such a case to be their public champion? The question is often difficult and complex. It is not merely a matter of his own individual freedom. It involves the interests of the college and of the public at large. If he has sufficient reason to believe that the harm he may do to his college will be slight and doubtful, while the welfare of the nation may depend on his speaking out, of course he ought not to be silent. But, if his calm and sober sense perceives that his public utterances will not aid the general welfare very much, while they will arouse a bitter controversy, to the great detriment of his college, self-restraint will be a proof, not of timidity, but of good judgment.

In a very extreme case only ought a college to dismiss a president or professor for his utterances on public questions. The largest liberty of speech that is compatible with the true interests of the institution should be preserved. Even when that measure of liberty is plainly exceeded, the injury must become serious before it will be wise to interfere and run the risk of still more serious injury from a controversy within the institution and a reputation for intolerance that it may unjustly get among unreasoning people.

Fortunately the instances in which such trouble arises are few. In fact they are fewer than newspaper reports would indicate. Of the supposedly forced resignations from college positions that have been attributed to unpopular utterances on public questions, some have been due to very different reasons.

The Miscalled Right of Privacy.

The question what rights of privacy a person may legally claim has arisen several times in recent years. Courts have not been well agreed concerning it, and those which have upheld such a right have not clearly defined its extent. A recent decision by Judge Davy of the supreme court at Rochester, New York, sustains a right of action by a girl against a manufacturer who used her portrait, without her consent, as an advertisement. He says that to refuse her relief "would be to admit that wrong has been committed which causes her severe mental pain and distress and pecuniary injury, and yet the law can afford her no relief. Such a rule is contrary to my views of equity jurisprudence." This decision commends itself to one's sense of justice and decency. The fundamental principle of law on which it can be supported is not so clear.

No valid distinction in principle seems to exist between the unauthorized publication of a portrait and any other publication by which a person is brought into undesired publicity. One's face is no more sacred than his reputation or anything else pertaining to his personality. The wrongful publication of one's portrait, except when it affects a property right, is only one particular mode of discrediting him in the estimation of others. The essence of the wrong is the injurious effect upon his property right or upon his reputation or standing among other people. It is merely incidental and immaterial whether the printed characters used to describe him are the ordinary letters of the alphabet grouped into words, or mere lines and dots grouped into a picture. An advertisement which should in words minutely and vividly describe the beauty of a lady whom it fully identified might be quite as objectionable to her and quite as serious an invasion of her right of privacy as if it published a copy of her photograph. Word pictures might be the most damaging of all pictures.

The right to be let alone or ignored by the

public cannot be absolute. To give information about a person to other people is in itself innocent, and is not a violation of his rights. It is essentially the same whether such information is given by writing, by print, or by the more primitive language of pictures. The wrong, if any, does not begin until the information is of such a character or given in such a way or under such conditions as to cause injury. The conceded right of people to speak or publish information about each other, so long as the publication is not defamatory, sufficiently shows that a right to complete privacy cannot exist. A respectful and creditable biographical sketch of a person in a local history, with similar sketches of his neighbors, would hardly be deemed unlawful; and its character is not changed by including a fair portrait as part of the sketch. Publishing such a portrait of a citizen in a local newspaper in connection with a truthful and courteous item of news concerning him would not be harmful, and for that reason would doubt less be held entirely legal. These illustrations make it evident that the unauthorized publication of a person's portrait cannot be held in every case to be an actionable wrong. But when one's portrait is used, without his consent and in such a way as to disgrace, humiliate, or prejudice him in the eyes of other people, the publication is tortious and essentially libelous. There can be no question that the publication of a portrait of a lady as an advertisement for merchandise without her consent might be made in such a way as seriously to prejudice her in the opinion of other people, and therefore do her a legal wrong. Her right of action might well be based, not on any theory of an abstract right of privacy, but on the fact that such a publication is derogatory in its character, and may subject her to ridicule, loss of respect, and consequent humiliation.

The public character of a person's life cannot deprive him of the right to be protected against libels, whether they consist in the wrongful publication of his portrait or otherwise. Every person's life is in some sense public. The difference between people in this respect is one of degree. The nature of their right is the same, whether they live a relatively retired or more conspicuous life. But the degree of the publicity of the person's career may be material in determining whether a publication concerning him is harmful or not, and also whether, if harmful, it is for any reason justifiable. In case of public officers or candidates for office public policy may justify what would be illegal in case of other citizens.

Another kind of right also is involved when an unauthorized use of one's portrait is made for advertising purposes. This is the right of property. One's portrait, like his name, may be used to designate his goods as part of a trademark or otherwise. The mere possibility that he may thus use it some time, if not now, is sufficient to make the right to its exclusive use a property right, and entitle him to a remedy against any other person who attempts to appropriate it without permission. For this reason equity can certainly grant an injunction against the wrongful use of a portrait for trade purposes, although it might refuse such remedy against a publication which was injurious only to feelings or reputation.

The fair conclusion of the matter seems to be that an invasion of the so-called right of privacy by a publication, when actionable, is so, not because there is any right of privacy as such, but because the publication is damaging to one's reputation or standing, and therefore in the nature of a libel, or else because its use for trade purposes, may affect his property rights.

Right to Plead Inconsistent Defenses.

On the question of inconsistency between different pleas or defenses in the same answer different theories have been applied to different classes of actions, frequent statutory changes have been made, and much apparent conflict of authority has arisen. Under the original common-law rule adhered to for ages, a defendant could plea but one plea without infringing the rule against duplicity. But the statute of 4 Anne, chap. 16, § 4, authorizing a defendant, with leave of court, to plead as many several matters as he shall think necessary for his defense, entirely superseded the original common-law rule, and was adopted by many, if not all, the states as common law, but has been itself superseded in some states by Code provisions.

Under this statute the courts formerly withheld leave to set up defenses inconsistent with each other, and did not permit a union of matter in avoidance with a denial of the plaintiff's claim, because the avoidance was deemed a confession of the cause of action. Nor could two pleas be united when they raised issues triable by a different method or form of action or in a different court. But the rule against

the union of a denial and an avoidance was gradually relaxed so far as inconsistency by implication of law was concerned, and changed into substantial conformity to the rule in equity. This permits a defendant to deny the plaintiff's claim, and set up other matters and defenses not wholly inconsistent with the denial, but not to set up two distinct defenses which are so inconsistent that, if one be true, the other must necessarily be untrue in point of fact.

An entirely new system of pleading, differing materially in principle and application from the old, was instituted by the Codes, which require the statement of facts according to their legal effect and abolish fictions, though some of the older cases show a conservative tendency on the part of the judges to import the principles of the old into the new. The Code rule that a defendant may plead as many defenses as he has, or as he deems necessary, is held in most of the Code states to allow defenses that are inconsistent. But in Missouri, Kansas, Minnesota, Wisconsin, and Louisiana the right to set up several defenses is limited, either by the language of the statute, or by the decisions of the courts, to consistent defenses. This conflict, however, is more apparent than real. Though the rule that inconsistent defenses may be pleaded is laid down absolutely in a large number of cases, other cases decided by the same courts have limited it to defenses which are inconsistent by implication of law as distinguished from those which are inconsistent in fact, while the courts in states holding that defenses must be consistent have defined objectionable inconsistency as inconsistency in fact, as distinguished from inconsistency by implication of law.

The test of objectionable inconsistency under the Codes, as in equity, and by the more relaxed rule under the statute of Anne, is generally the question whether both defenses may be true, or whether, if one be true, the other must be false, and proof of one must necessarily disprove the other.

The rule that one plea cannot be treated as a waiver of another inconsistent with it, or as an admission of the facts stated or admitted in it, so as to dispense with proof on the trial of the issues formed by the other, has been declared in one group of states, while the courts of the other group hold that pleas containing admissions will operate as a waiver or admission as against other pleas less favorable to the plaintiff. But upon this question, as upon the other, the courts have approached the same point from different directions, both aiming at the true rule, which is that a less favorable defense can be treated as an admission or as a waiver of a more favorable one where the inconsistency is one of fact and the admission is formal and explicit and might have been avoided, but that it cannot be so treated where the inconsistency is by implication of law as distinguished from inconsistency in fact, and the admission is unavoidable in order to present all the defenses which the party was entitled to make.

A defense cannot be disregarded because inconsistent with another defense. The party aggrieved must move to compel the pleader to elect between the inconsistent defenses, or move to strike out one of them or demur to the pleading. A motion to compel an election is the remedy most frequently availed of, and some of the cases have held a demurrer to be inapplicable. The multitude of cases on this subject are to be found in a note in 48 L. R. A. 177.

Index to Notes.

IN

LAWYERS' REPORTS, ANNOTATED.

Book 48, Parts 3 and 4.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.

reason justifiable. In case of public officers | or in a different court. But the rule against

The part containing any note indexed will be sent with Case and Comment for one year for $1.

Among the New Decisions.

Attorneys' Fees.

Allowing attorney's fees in addition to costs to successful lien claimants is held, in Davidson *v.* Jennings (Colo.) 48 L. R. A. 340, to be in violation of the provision of the bill of rights that courts shall be open to every person, and that right and justice shall be administered without sale, denial, or delay.

Auctions.

One who bids at a public sale, not because of any desire to purchase, but merely to run up the price, either in his own interest or that of another, is held, in McMillan *v.* Harris (Ga.) 48 L. R. A. 345, not to be a "puffer," if in case his bid is the last and highest he can be compelled to take and pay for the property, although by arrangement with others he may not be compelled to keep and pay for it.

Banks.

The published reports of a bank purporting to show its resources and liabilities, but not

tiff. But upon this question, as upon the other, the courts have approached the same

copies; (b) time; (c) application to collector: (1) who may apply; (2) to what district;

made to induce a person to sign the bond of an employee of the bank as a surety, are held, in Lieberman *v.* First National Bank (Del.) 48 L. R. A. 514, to furnish no relief to such surety, although he relied upon them and they failed to show previous defalcations of such employee which he had concealed by false entries.

The holder of a check drawn by a bank which becomes insolvent before its presentation, whereupon the drawee bank, without knowledge of the check, applies the deposit upon its own claims against the insolvent bank, is held, in Wyman *v.* Ft. Dearborn Nat. Bank (Ill.) 48 L. R. A. 565, to be entitled to subrogation to any collateral which the drawee bank has after its own claims are satisfied.

Sending a certificate of deposit directly to the drawer for collection without instructions to do so is held, in First National Bank *v.* Citizens' Savings Bank (Mich.) 48 L. R. A. 583, to constitute negligence on the part of the collecting bank for which it will be liable in case of a resulting loss, but implied instructions to so send it are held to be made when the drawer is the only bank in the place, and is rated and supposed to be responsible, while the instructions are, after calling attention to the fact that the collecting bank had a correspondent at that place: "Please collect for us at your best rate of exchange."

Bridges.

A person undertaking to cross a bridge with a heavy traction engine and water tank is held, in Board of Commissioners *v.* Coffman (Ohio) 48 L. R. A. 455, to do so at his own risk, if he does not make a sufficient examination of the bridge, and if he puts upon it a load that is extraordinary.

Champerty.

A deed of land held adversely by third persons is held, in Ft. Jefferson Improvement Co. *v.* Dupoyster (Ky.) 48 L. R. A. 537, not to be subject to attack by the vendee to avoid taking the title tendered, if in the meantime the vendor has bought in the outstanding title.

Commerce.

A territorial statute which imposes a license fee as a condition upon which coal oil may be sold in the territory is held, in *Re* Wilson (N. M.) 48 L. R. A. 417, to be unconstitutional and void in so far as it applies to sales in original packages by the importer of coal oil produced and refined without the territory.

Constitutional Law.

The power of the legislature to apportion the burden of constructing a highway or bridge among towns benefitted thereby, although not touched by it, is sustained in State *ex rel.* Bulkeley *v.* Williams (Conn.) 48 L. R. A. 465, and the levy of such burdens on the towns is held not to violate any right of local self-government.

A statute imposing upon mine owners the burden of paying the cost of inspecting the mines is held, in Chicago, W. & V. Coal Co. *v.* People (Ill.) 48 L. R. A. 554, to constitute a valid exercise of the police power.

An ordinance which provides that the city shall do the work and furnish the materials for making a sewer connection up to within 3 feet of the building to be connected is held, in Slaughter *v.* O'Berry (N. C.) 48 L. R. A. 442, to be void as an unreasonable invasion of the rights of property owners, although the city may properly specify the materials to be used and provide that the work shall be done only by some person licensed by the city to make such connections, and under the supervision of the city inspector.

Contracts.

A contract by which a sheriff and tax collector turns over the tax list to another person with an agreement to give him a certain commission for collecting the taxes is held, in Cansler *v.* Penfield (N. C.) 48 L. R. A. 441, to be illegal and void on grounds of public policy, under a statute providing that the sheriff shall not "let to farm in any manner his county or any part of it."

Criminal Law.

A sentence of conviction imposed under a statute after reversal of a former judgment imposed under a statute that was unconstitutional because retroactive is held, in Com. *v.* Murphy (Mass.) 48 L. R. A. 393, not to violate a constitutional provision against double jeopardy or other constitutional guaranties, although the convict had partly served the invalid sentence before it was reversed, including one day's solitary confinement, to which each sentence condemned him.

tions; (III.) power in respect to officers and

to show its resources and liabilities, but not

Eminent Domain.

The destruction of oysters by casting sewage upon them, though from a sewer constructed by a city under legislative authority, is held, in Huffmire v. Brooklyn (N. Y.) 48 L. R. A. 421, to be as clearly a taking of the property of the owner of the oyster bed for which he has a constitutional right to compensation as if there had been a physical removal and conversion of the oysters.

Fisheries.

The right to fish in a nontidal pond is held, in Albright v. Cortright (N. J.) 48 L. R. A. 616, not to be created by the fact that the public had been accustomed to fish in the pond for sixty years, or that the state fish commissioners had stocked the pond with fish for twenty-five years. Neither custom nor prescription was held sufficient to create the right.

Garnishment.

A debt due from an insurance company for loss in another state is held, in Strause Bros. v. Ætna Ins. Co. (N. C.) 48 L. R. A. 452, not to have any situs in a third state so as to sustain a garnishment there by a creditor of the insured merely because there was an insurance agent in the state on whom process could be served under the state statutes.

Husband and Wife.

An antenuptial contract by which a wife agrees, for a certain sum, to release all interest in her husband's estate, in order that it may pass by his will, with a covenant not to interfere therewith, is held, in Hudnall v. Ham (Ill.) 48 L. R. A. 557, sufficient to preclude her from contesting the right of the beneficiaries under the will on the ground that it was revoked by the marriage, especially when she has accepted the consideration agreed upon after her husband's death.

Indictment.

An indictment found by the grand jury on a holiday is held, in State v. Thomas (Ohio) 48 L. R. A. 459, not to be for that reason invalid.

Injunction.

An injunction against the enforcement of a statute requiring the inspection of beer on the ground that the statute is unconstitutional is denied in State, *ex rel.* Kenamore, v. Wood (Mo.) 48 L. R. A. 596, where the statute is enforceable only by criminal proceedings, since equity has no jurisdiction to enjoin criminal prosecutions.

Insurance.

A voluntary exposure to unnecessary danger within the meaning of an exception in an insurance policy is held, in Fidelity & C. Co. v. Sittig (Ill.) 48 L. R. A. 359, not to be made by an attempt of a traveling salesman to get upon a train in motion, if the danger is not so apparent that any man of ordinary intelligence would know it.

The liability of a member of a mutual benefit society to pay an assessment is denied, in Gibson v. Megrew (Ind.) 48 L. R. A. 362, where his contract does not provide that he shall pay assessments or make any provision as to nonpayment except that his certificate shall be forfeited thereby.

The right to insurance on property destroyed by fire after an oral contract to insure, but before issuance of a policy, is held, in Hicks v. British America Assurance Co. (N. Y.) 48 L. R. A. 424, to be subject to the provisions and conditions of the standard policy prescribed by law, including that as to furnishing proofs of loss within a specified time.

The acceptance of a proposition to buy real property, which is definite in nothing except the amount to be paid, is held, in Arkansas Fire Ins. Co. v. Wilson (Ark.) 48 L. R. A. 510, not sufficient to defeat insurance thereon, under a policy providing that it shall be void if the interest of the assured becomes other than that of unconditional and sole ownership.

Internal Revenue.

The right to use an instrument as evidence in a state court is held, in Knox v. Rossi (Nev.) 48 L. R. A. 305, not to be subject to the provisions of the Federal war revenue act to the effect that instruments not stamped cannot be used as evidence in any court. With this case is a note reviewing the numerous English and American cases as to the effect of the omission to stamp an instrument on which the law requires a stamp or to cancel the stamps thereon.

M.) 48 L. R. A. 417, to be unconstitutional and void in so far as it applies to sales in original

ing one day's solitary confinement, to which each sentence condemned him.

Judgment.

The lien of a judgment on lands is held, in Doster v. Manistee Nat. Bank (Ark.) 48 L. R. A. 334, not to extend to lands previously conveyed, though with intent to defraud creditors, and though the statute provides for sale on execution of lands of which the judgment debtor or any person for his use is seised in law or in equity.

Master and Servant.

A railroad employee injured through negligence of a coemployee is held, in Smith v. St. Louis & S. F. R. Co. (Mo.) 48 L. R. A. 368, to have no right of action because of negligence in employing him, if his negligence was not with respect to acts for the performance of which he was employed.

A promise by an employer to pay for services engaged by an employee for the benefit of another employee, when it is accompanied by a denial of any liability, is held, in Holmes v. McAllister (Mich.) 48 L. R. A. 396, not to constitute a ratification, but only a promise to pay the debt of another, which is void under the statute of frauds.

The use of a stub switch which is safe when used in a proper manner, although it is unsafe to run a train through it in the wrong direction, is held, in Grattis v. Kansas City, P. & G. R. Co. (Mo.) 48 L. R. A. 399, not to constitute negligence on the part of the railroad company toward its servants.

The conductor of a freight train who takes the engine and goes forward a mile or two from the station, by order of the road superintendent, to see whether certain culverts are safe or whether they have been injured by a recent heavy storm, is held, in Terre Haute & I. R. Co. v. Fowler (Ind.) 48 L. R. A. 531, to be within the scope of his employment while riding on the engine between two of such culverts over a trestle which breaks down, causing his death.

The mere fact that an employee thinks an act is unsafe is held, in McKee v. Tourtellotte (Mass.) 48 L. R. A. 542, insufficient to render him guilty of negligence in performing it, if the employer assures him that there is no danger.

Mines.

The forfeiture of an oil and gas lease for failure to comply with a condition precedent by boring a well is held, in Huggins v. Daley (C. C. A. 4th C.) 48 L. R. A. 320, not to require any judicial proceeding, where the lease merely gives the right to the oil and gas, with the privilege of operating therefor on the land, since the landlord has never been out of possession and cannot re-enter upon himself.

Mortgages.

A purchaser of land of a corporation on foreclosure, who voluntarily pays a claim for taxes before the sale is approved or he has complied with his bid, and when he has no knowledge of any dispute as to its validity, but is denied credit therefor on completing his purchase, is held, in Walters v. Charleston Mills (C. C. A. 4th C.) 48 L. R. A. 503, to be entitled to subrogation to the claim for such part of the tax as the property was clearly subject to; but the court refuses to require a receiver to recognize such payment of taxes which were in dispute, or to assume the burden and responsibility of litigation thereon.

Municipal Corporations.

A municipal corporation which has exercised the power conferred by statute of prescribing the method of payment for local improvements is held, in Pontiac v. Talbot Paving Co. (C. C. A. 7th C.) 48 L. R. A. 326, not to be liable for the expense as a general charge upon the city, when the work has been done to be paid for by special assessment.

A nuisance created by the pollution of a stream by city employees and a chain gang operating a rock quarry outside the city is held, in Duncan v. Lynchburg (Va.) 48 L. R. A. 331, to create no liability against the city for the nuisance, when its charter gives no authority to operate the quarry, unless it is implied from certain provisions which expressly include a denial of liability.

The cost of providing water for a city, although expressly authorized by charter, is held, in Edgerton v. Goldsboro Water Co. (N C.) 48 L. R. A. 444, not to constitute a necessary expense of the city within the meaning of a constitutional provision against indebtedness or taxation for anything except necessary expenses, without a majority vote.

An ordinance making it a penal offense to maintain a sign over a sidewalk is held, in State v. Higgs (N. C.) 48 L. R. A. 446, not to be included in the charter power to open

streets and keep them free and clear from obstructions, and to be unreasonable, oppressive, and void as applied to a sign which does not impede, delay, obstruct or in any way endanger the use of the sidewalk.

The acts of officers of a municipal corporation in aiding an unlawful conspiracy resulting in a riot are held, in Wallace *v.* Norman (Okla.) 48 L. R. A. 620, insufficient to create a liability against the municipality, as the officers in so doing are not acting within the scope of their powers.

Newspapers.

A publication circulating among various classes of people, containing printed matter which consists principally of legal notices and other legal matters, but also containing advertising of a miscellaneous character and literature of a general kind, and a limited amount of general news of current events, is held, in Hanscom *v.* Meyer (Neb.) 48 L. R. A. 409, to be a newspaper, within the meaning of a statute providing for a publication of notices in the newspapers.

Discrimination between newspapers in the sale of news by a press association which has charter power to own and operate telegraph lines and exercise the right of eminent domain is held, in Inter-Ocean Pub. Co. *v.* Associated Press (Ill.) 48 L. R. A. 568, to be unlawful because the business of the press association is affected with a public interest, and a by-law providing that the members of the press association shall not furnish its special news to, or receive news from, any person or corporation declared antagonistic to it is held void as creating a monopoly.

Officers.

An officer who accepts a second office when he cannot hold both is held, in Oliver *v.* Jersey City (N. J.) 48 L. R. A. 412, to be an officer *de facto* whose acts will be valid as to the public, if he continues to act in his original office.

Parliamentary Law.

The veto power of a mayor is held, in Cate *v.* Martin (N. H.) 48 L. R. A. 613, not to extend to a veto of the action of a board of aldermen sitting as a court in a matter of which the statutes have made the board the exclusive and final judge.

Public Moneys.

Appropriating the money of the state for the expense of a private normal university, in consideration of the gratuitous instruction of teachers for the common schools, is held, in Boehm *v.* Hertz (Ill.) 48 L. R. A. 575, not to constitute an assumption of the debts or liabilities of such corporation or a loan or extension of credit to it in violation of the Constitution.

Railroads.

A combination of railroad lines is held, in State *v.* Central of Georgia R. Co. (Ga.) 48 L. R. A. 351, not to be in violation of a constitutional provision against consolidation of competing lines, even though competition may be thereby lessened at some points, if as a general result the public at large, as distinguished from the people of special or particular communities, is benefited by the combination.

Schools.

The right of the voters of a district township to rescind a vote for a tax to build a schoolhouse in a subdistrict, at a regular meeting subsequent to that at which the tax is voted, is held, in Hibbs *v.* Board of Directors (Iowa) 48 L. R. A. 535, to exist by necessary implication from the power to vote the tax, when the rescission is made before the tax has been collected, levied, or certified to the board of supervisors for that purpose.

Street Railways.

A consolidation of street-railway lines is held, in Trust Co. *v.* State (Ga.) 48 L. R. A. 520, to be valid, although competition may be lessened thereby at some point and the Constitution prohibits consolidation which will lessen competition, if the effect of the consolidation upon the public generally is beneficial.

Taxes.

The exemption from taxation of property used for college purposes is held, in Harvard College *v.* Assessors of Cambridge (Mass.) 48 L. R. A. 547, to extend to dormitories and dining halls and dwellings occupied by the president and college professors. To similar effect, it is held in Phillips Academy *v.* Ando-

failure to comply with a condition precedent

be included in the charter power to open

ver (Mass.) 48 L. R. A. 550, that such exemptions extend to the premises occupied by the professors of an academy.

Trial.

The practice of withdrawing a juror for the purpose of postponing or continuing the trial of a civil case is held, in Usborne v. Stephenson (Or.) 48 L. R. A. 432, not to prevail in Oregon.

Wills.

A condition in a legacy that the legatee's right thereto shall depend upon the decision of the executors at the end of a certain time that he is a reformed man is sustained in *Re* Jones (Mich.) 48 L. R. A. 580, on the ground that it is sufficiently certain, and that such decision is a condition precedent to his right to the legacy.

New Books.

"Elliott's Trial and Appeal Practice for Minnesota." (Keefe-Davidson Law Book Co., St. Paul, Minn.) 1 Vol. $3.75.

"Irrigation Laws and Decisions of California." By John D. Works. (Bancroft-Whitney Co., San Francisco, Cal.) 1 Vol. $1.50.

"Bigelow on the Law of Bills, Notes, and Checks." 2d Edition, Much Enlarged. (Little, Brown & Co., Boston, Mass.) 1 Vol. $3.50. Buckram, $3.

"Elements of American Jurisprudence." By William C. Robinson. (Little, Brown & Co.) 1 Vol. Buckram, $3.

"Schouler on Wills." 3d Edition. (Boston Book Co., Boston, Mass.) 1 Vol. $5.50.

"Digest of the Decisions of Law and Practice in the Patent Office from January, 1890, to July, 1900." By Lepine Hall Rice. (George B. Reed, Boston, Mass.) 1 Vol. $5.

"Norton on Bills and Notes." 3d Edition. By F. B. Tiffany. Includes Negotiable Instruments Law. (West Publishing Company, St. Paul, Minn.) 1 Vol. $3.75.

"General Laws of New York." Edited by Edward L. Heydecker. (Matthew Bender, Albany, N. Y.) 4 Vols. $15.

"The Public Statutes of New Hampshire." New Edition 1900. By William M. Chase and Arthur H. Chase. (Edson C. Eastman, Concord, N. H.) 1 Vol. $6.

"Deering's California Digest." 112-125 Cal. Rep. (Bancroft-Whitney Co.) 1 Vol. $6.

Recent Articles in Law Journals and Reviews.

"The Legal Status of Foreign Corporations on Failure to Comply with Restrictive Statutes."—51 Central Law Journal, 104.

"The Law of the So-Called 'Independent Contractor' in Its Relation to the Doctrine of Master and Servant in the State of Illinois."—32 Chicago Legal News, 423.

"Subrogation between Partners."—6 Virginia Law Register, 253.

"Former Jeopardy."—6 Virginia Law Register, 243.

"The Torrens System of Land Transfer."—6 Virginia Law Register, 215.

"The Law of the Chinaman."—12 The Green Bag, 423.

"Curiosities of Rent."—12 The Green Bag, 404.

"Origin and Growth of Rights of Accused."—12 The Green Bag, 392.

"Is the 'Craig Law' Constitutional?"—1 North Carolina Law Journal, 171.

"The development of the Law."—1 North Carolina Law Journal, 155.

"Completion of Contracts by Mail or Telegraph."—39 American Law Register, N. S., 354.

"Status of Inhabitants of Territory Acquired by Discovery, Purchase, Cession, or Conquest, According to the Usage of the United States."—39 American Law Register, N. S., 332.

"Has the Study of Law a Place in a Liberal Education."—39 American Law Register, N. S., 321.

"The Standard of Admission and Legal Ethics."—1 North Carolina Law Journal, 205.

"Time to Appeal to Court of Appeals."—7 New York Annotated Cases, 125.

"Service of Notice of Protest and Dishonor."—7 New York Annotated Cases, 100.

"Remedies to Enforce Payment of Fees of Justices of the Peace."—7 New York Annotated Cases, 132.

"Recovery of Rent after Removal of Tenant by Summary Proceedings."—7 New York Annotated Cases, 161.

"Judgment at Trial on Pleadings."—7 New York Annotated Cases, 95.

"Examination of Party or Witness in Proposed Action."—7 New York Annotated Cases, 154.

"Costs on Disputed Claims against Decedents' Estates."—7 New York Annotated Cases, 142.

"Compensation of Assigned Counsel."—7 New York Annotated Cases, 119.

"Official Bonds of State and Municipal Officers not Taxable by the Federal Government."—51 Central Law Journal, 165.

"The Obligation of the Legislature, as well as of the Judiciary, to Respect Constitutional Limitations."—8 American Law Register, 441.

"Of the Rule that a Demurrer Searches the Record."—8 American Law Journal, 121.

"The Payment of Alternative and Trust Deposits."—17 Banking Law Journal, 588.

"Statements to and Reports of Commercial Agencies as Basis for Charge of Fraud."—3 Legal Adviser, 653.

"Municipal Liability for Breach of Duties."—51 Central Law Journal, 126.

"The Acceptance of Benefits from Railroad Employees' Relief Associations as a Defense to Actionable Negligence Resulting in Personal Injuries or Death."—51 Central Law Journal, 143, 172.

"Notes on the Early History of Legal Studies in England."—25 Law Magazine and Review, 389.

"Privileged Communications; Husband and Wife."—25 Law Magazine and Review, 406.

"Suzerainty; Mediæval and Modern."—25 Law Magazine and Review, 413.

"Criminal Statistics, 1898."—25 Law Magazine and Review, 452.

"The Limited Liability of Landlords."—25 Law Magazine and Review, 459.

"Assumpsit for Use and Occupation."—25 Law Magazine and Review, 478.

"What Has Been Found in Law to Be the Most Satisfactory Test to Determine What Constitutes a Partnership, and Why?"—62 Albany Law Journal, 132.

"The Relation of Constitution and Laws of the United States to Territory Acquired by Treaty or by Conquest."—62 Albany Law Journal, 137.

The Humorous Side.

THE SKIPPING OF SKIPWITH.—The recent case of Skipwith *v.* Hurt was an action by a county judge on a county treasurer's bond. The county treasurer was Skipwith, who skipped with the funds, and the county judge, who was Hurt, brought the action.

HEIRS BY WILL.—The elasticity of statutory language is shown by a recent Pennsylvania decision to the effect that devisees, though not kin of the testator, are his "heirs" within the meaning of statutes providing that, if he dies without heirs or kindred, his widow, by electing to take against his will, may have the whole estate.

A FRANK CONFESSION.—The opinion in an early Maryland case "acknowledges the corn" by saying that something referred to was "at a former sitting when the court was full."

ANTIQUE LAW REPORTS.—The first volume of a new series of bankruptcy reports, though published in this year of our Lord Nineteen Hundred, is cited by its publisher as 1 B. C. They seem to be published *nunc pro tunc*.

THE LAWYERS' SAFETY VALVE.—Expressing his opinion of the court often seems to give a defeated attorney permanent relief. Some compliments to the Bench are given below. One writes concerning an adverse decision: "The case is a legal curiosity, and seems to have been decided by main force." Another, who had been overthrown in a highway case, writes of the court: "They do not know a highway even when they stumble over it." Some ask us to overrule and chastise the court. One writes: "It will be of great benefit to the profession that this case be thoroughly aired and the fallacy and danger of it in its far-reaching results exposed." Another very prominent lawyer says: "The opinion of our court is a school-boy blunder, deserving of nothing but scathing rebuke, and a review of it should run in that line." But the most seductive suggestion comes in this form: "I should be very willing to pay for such a criticism of the decision as is herein above indicated by me." This recalls the Quaker chasing his hat in the wind, who hired an urchin to curse it.

A PRESUMPTION OF ERROR.—This anecdote of the famous Judge Martin Grover, of the New York court of appeals, we believe was never published. An attorney, deliberately opening his case in the court of appeals, made an unusually long pause, after announcing that it was an appeal from the general term of the . . . department, the judges of which were then regarded as very weak, whereupon Judge Grover broke in and said, "Proceed, Mr. . . . , your first point seems to be well taken."